IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 10 OF 2005

State ... Appellant

versus

Antonio Soares
H.No.101,
Borsulem, Coelim,
Cansaulim Goa. ... Respondent

Ms. W. Coutinho, Public Prosecutor for the State/Appellant.

Mr. Dajvip Patkar, Advocate for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 25TH AUGUST, 2006.

ORAL JUDGMENT

This is State's appeal against the acquittal of the accused under Sections 279, 338 I.P.C. by Judgment dated 21-8-2004 of the learned J.M.F.C., Vasco da Gama.

2. There is no much dispute as to facts. The accident took place between a maruti van bearing No.GA-02/T-3593 driven by Prakash/PW2 and a tempo bearing No.GA-02/V-5926 driven by the accused. The tempo driven by the accused was proceeding from Cansaulim towards Birla/Vasco da Gama, whilst the van driven by Prakash/PW2 was proceeding from Birla towards Cansaulim, in opposite direction. At present, it is not disputed that there was a stationery bus parked ahead of the tempo in the direction the tempo driven by the accused was going, though before the trial Court the accused had denied that there was any such bus. Head Constable Gurav/PW3 who at the relevant time was attached to Verna Police Station received information about the said accident through PCR(Police Control Room) and he proceeded to the scene of accident and after securing the presence of two panchas conducted the panchanama and prepared a sketch in support of which Krishna/PW1 came to be examined. From the panchanama and the sketch, it can be seen that the road at the place of accident is a straight road and while the van driven by Prakash/PW2 is seen on its left hand side of the road, the tempo driven by the accused is seen at the extreme right side of the road, partly on the kutcha road. The

panchanama and the sketch also show that there was a clear distance of about 3.10 meters of the tar road and about a meter of the kutcha road by which the tempo driven by the accused could have passed as it was being driven from Cansaulim towards Birla/Vasco da Gama.

3. The accused came to be charged and tried upon a formal complaint filed by Head Constable Gurav/PW3 with the allegation that on 8-3-2003 at 11.15 hours at Cansaulim, near the Church, the accused drove his said tempo in a rash and negligent manner and dashed the same on maruti van causing fractures to Prakash Pawar/PW2.

4. The Inspection Report of both the vehicles as well as the Medical Certificate of Prakash/PW2 were produced by the prosecution under Section 294 of the Code of Criminal Procedure, 1973(Code, for short). The Hurt Certificate-Exh.26 of Prakash/PW2 shows that Prakash/PW2 had suffered grievous injuries. In fact, Prakash/PW2 has suffered displaced fracture of lower 1/3rd of left tibia and fibula and fracture of medial mallelous with undisplaced fracture of the lower 1/3rd of right

fibula. The learned trial Court had rightly held that the injuries of Prakash/PW2 were duly proved by the prosecution. As regards the said injuries there is no grievance made at the time of hearing of this appeal, as well.

5. The only eye witness examined by the prosecution was none other than the said Prakash/PW2, the driver of the van whose evidence, the learned J.M.F.C. has not accepted on the ground that he was an interested witness without finding out whether the evidence given by him was probable or not. The accused when he was examined under Section 313 of the Code had merely stated that he was falsely implicated in the case. In fact, the accused did not even explain as to how the tempo driven by him went to the extreme right of the said road and dashed against the van driven by Prakash/PW2 which was on its left and correct right side of the road.

6. The accident report forms of both the vehicles show that the Matador tempo had damages on the grills on the front of the radiator and its bumper was dented, on the front. The maruti van could not be road tested and there were damages on

the right hand side. Its right hand side light, driver's door, front show, dash board etc. were all damaged. In other words, the said report shows that the van had suffered greater damage than the tempo. Both the vehicles presumably had not applied brakes since no brake marks are seen on the panchanama or the sketch.

7. Prakash/PW2, the only eye witness examined by the prosecution, stated that he was proceeding from Cansaulim to Velsao(towards Vasco) in the said maruti van and when he reached near the ice factory he had seen the bus that had stopped in front of him on the other side of the road and he had slowed down on seeing the said bus. He stated that a tempo which was overtaking the said bus came in a fast speed and gave a dash on the van on the driver's side, in the front as a result of which the entire front part/show of the van was damaged. He stated that his neck was jammed and he could not go out of the van and both his legs were fractured. He also stated that it was not possible to remove him from the van and the accused and one Vallabh had rescued him out of the said van. He had also stated that the accused was driving the said tempo. The cross-examination of Prakash/PW2 was by and large restricted to only

denials. There is no reason why the learned J.M.F.C. could not have accepted the evidence of Prakash/PW2 more so when his evidence was substantiated by the scene of offence panchanama and the sketch drawn by the Police which were proved through the evidence of Krishna/PW1, an independent panch witness.

8. Mr. Dajvip Patkar, the learned Counsel, appearing on behalf of the accused, now does not dispute that there was a bus as stated by Prakash/PW2, which was stationery, on the other side of the road namely the side by which the accused was driving the tempo. Mr. Patkar further submits that the accident could have arisen out of sheer error of judgment because both the vehicles wanted to cross the said bus which was stationery and this fact is evident from the statement of Prakash/PW2 because Prakash/PW2 as stated by him, had slowed down his van on seeing the said bus. It is also submitted that overtaking a stationery bus is not prohibited and that the accused could have overtaken the said bus and possibly by the time the accused decided to overtake the said bus, the said bus moved and as a result of which the tempo driven by the accused came in contact with the van driven by Prakash/PW2. It is also submitted by

Mr. Patkar that the statement of Prakash/PW2 that the tempo came in a fast speed could not be accepted because it would not have been possible for him to say, when he too was moving, that the other vehicle was moving in a fast speed. It is also submitted by Mr. Patkar that it is quite possible that the brakes of the van were not functioning because it could not be road tested as stated in the accident report form. It is submitted by Mr. Patkar that the learned J.M.F.C. had rightly given benefit of doubt to the accused and therefore this Court may not interfere with the same.

9. I have no hesitation to accept the evidence of Prakash/PW2 because his evidence is sufficiently corroborated by the circumstances as noted in the scene of offence panchanama and the sketch and which show that the tempo driven by the accused went to the extreme right side of the road and in fact beyond the tar road and dashed against the van driven by Prakash/PW2 which was on its correct side of the road. The evidence of Prakash/PW2 shows that his side of the road was not at all obstructed though he slowed because he had to cross the bus which was on the other side of the road namely on

the side which the accused was proceeding. The evidence of Prakash/PW2 also shows that the side of the accused was obstructed by the said bus. If the side of the accused was obstructed by the said stationery bus then it was certainly the duty of the accused, as the driver, to have stopped and allowed Prakash/PW2 to proceed in his direction since his side of the road was clear and unobstructed but the facts stated by Prakash/PW2 coupled with the position of the vehicles as seen from the panchanama and the sketch show that the accused as driver of the tempo having total disregard to the oncoming van of Prakash/PW2 tried to overtake the said stationery bus and in that process went on the wrong side of the road and dashed against the van driven by Prakash/PW2 and in doing so that it was very clear that the accused drove the said tempo in a rash manner without having regard to the consequences which would naturally follow.

10. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the

circumstances, out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. Rashness consists in hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury. Negligence connotes want of proper care while rashness conveys the idea of reckless doing of an act without consideration of any consequences. The facts stated by Prakash/PW2 as substantiated by circumstances seen from the panchanama/sketch were more than sufficient to conclude that the accident had taken place on account of the rash driving by the accused of his tempo. The accused attempted to overtake the bus in utter disregard to the oncoming van and in that the accused was rash. It is now a well settled principle that the principle of res ipsa loquitur can be applied to a limited extent in a trial on a charge of criminal negligence as held by the Apex Court, speaking through three learned Judges, in the case of **Jacob Mathew** v. **State of Punjab and another**(2005 AIR SCW 3685).

11. If at all no statements of the passengers of the bus were recorded, it is presumably because by the time Head Constable Gurav/PW3 reached the scene the bus as well as the

passengers had moved away and for that reason the bus is also not seen on the panchanama and the sketch. Prosecution could not fail in the absence of recording the statements of bus passengers or by not examining them, in the circumstances of the case. The brakes of the van driven by Prakash/PW2 could not be tested on account of extensive damage suffered by the said van. The accused cannot derive any benefit from the said situation. The evidence of Prakash/PW2 was convincing and was substantially substantiated by circumstantial evidence. Accused gave no explanation as to how the tempo driven by him went to the right and dashed on the van which was on its proper side. Prosecution had proved its case beyond reasonable doubt against the accused. The learned J.M.F.C. therefore was not right in acquitting the accused under Sections 279, 338 I.P.C. The Judgment of the learned J.M.F.C., Vasco da Gama dated 21-8-2004 therefore deserves to be set aside. The accused is hereby convicted under Sections 279, 338 I.P.C.

12. Mr. Patkar, the learned Counsel on behalf of the accused submits that the accused along with the said Vallabh did help Prakash/PW2 to be removed out of the van and therefore

the same be considered as a mitigating circumstance in favour of the accused. Mr. Patkar further submits that the accused was driving the tempo belonging to the said Vallabh and that whenever the accused drives the said tempo, he gets an amount of Rs.100/- per day and otherwise the accused is in a dismal condition. It is therefore submitted that a lenient view be taken against the accused. Ms. Coutinho, the learned Public Prosecutor has left the matter as regards sentence to the discretion of the Court.

13. If at all the accused along with the said Vallabh helped Prakash/PW2 to be removed out of the van then they did only their duty, and nothing more.

14. Sentence it is said is the most public face of the criminal justice system. A sentence imposed by the Courts should have a deterrent effect more so when accident cases are on the rise. Courts are required to ensure that whenever an accused is found guilty, he does not escape the clutches of law very lightly. Sentencing discretion has got to be exercised considering the facts of each case. Considering the facts of this case, the accused

is hereby sentenced to undergo S.I. for one day(till rising of the Court) each under Sections 279 and 338 I.P.C. to run concurrently. In addition, the accused is sentenced under Section 279 I.P.C. to pay a fine of Rs.500/- in default to undergo S. I. for fifteen days. The accused is also directed to pay compensation under Section 338 I.P.C. to Prakash/PW2 in the sum of Rs.5000/- in default to undergo S.I. three months. The accused to surrender before the learned J.M.F.C. within a period of three weeks to undergo the said sentence or pay the fine/compensation.

N. A. BRITTO, J.

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